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IN THE

Supreme Court of the United States

October Term, 1970

No. ~~1731~~ 70-189

THOMAS CALLAHAN and THOMAS KAPATOS,
Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Thomas Callahan and Thomas Kapatos, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on March 22, 1971.

Opinion Below

The opinion of the Court of Appeals, dated March 22, 1971, is not yet reported, but is reprinted in the appendix hereto, p. A-1, *infra.*

Jurisdiction

Following a jury trial, the petitioners Thomas Callahan and Thomas Kapatos were found guilty on June 17, 1970 of charges of conspiracy to violate § 2113, the Federal

Bank Robbery Statute, and transporting a stolen vehicle in interstate commerce in violation of § 2112 of Title 18 of the United States Code.

On July 15, 1970, the petitioners Thomas Callahan and Thomas Kapatos were sentenced to five years on each charge to run consecutively.

The Court of Appeals for the Second Circuit affirmed the judgment of conviction on March 22, 1971.

On April 6, 1971, Mr. Justice Harlan signed an order extending the time for filing this petition for a writ of certiorari to and including May 21, 1971. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented

(1) Was the identification of the petitioner Kapatos impermissibly suggestive and violative of his Sixth Amendment right to counsel where he appeared at a Grand Jury proceeding with his lawyer and was secretly placed in a one-to-one line-up without his lawyer's knowledge?

(2) Whether a search of petitioner Callahan, conducted behind the closed doors at FBI headquarters, after he refused to be questioned, photographed, fingerprinted, and was told to "empty his pockets" can be considered voluntary in the constitutional sense.

(3) Whether petitioner's rights under the Fifth Amendment providing that no person shall be held to answer for an infamous crime, unless on a presentment or indictment of a Grand Jury, was violated where no factual witnesses were called before the Grand Jury but all of the hearsay evidence was summarized by an FBI agent?

(4) Whether petitioner Callahan's mere participation in the overall conspiracy to rob a money truck in New Jersey was sufficient to sustain a separate conviction of transporting in interstate commerce a stolen vehicle in which it is conceded he in no way participated in?

Constitutional Provisions Involved

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascer-

tained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutes Involved

Title 18, U. S. C. § 371 provides in part:

> "If two or more persons conspire either to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Title 18, U. S. C. § 2312:

> "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Title 18, U. S. C. § 2:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> "(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Statement of Facts

On December 21st, 1964, a money truck carrying $500,000 belonging to the First National Bank of Passaic County,[1] was intercepted and robbed by five men wearing masks.

---

[1] The First National Bank of Passaic County will be called the New Jersey Bank.

On August 5th, 1968, four years later, a nine-count indictment was returned in the Federal District Court for the Southern District of New York, charging Thomas Callahan and Thomas Kapatos, the Petitioners, and Frank Campbell, John Pierce and Henry Speditz, with conspiring to violate the Federal Bank Robbery Statutes [18 U. S. C. § 2113(a) and § 2113(d)].

Only the defendants Callahan and Kapatos were tried for these offenses, and the Government's case implicating them in these crimes rested almost exclusively upon the testimony of Charles Roberts, another co-conspirator who was neither named nor charged in the indictment.

Although the trial of these charges consumed ten days of testimony and involved 48 witnesses, it will not be necessary to devote much space in this petition to the coverage of all that evidence because only two counts of the original indictment were submitted to the jury, Count 1 (the conspiracy count) and Count 8 (the stolen car count). Thus, the facts relevant to those counts can be briefly sketched.*

Charles Roberts, the Government's chief witness, and the only person who implicated the Petitioners in the attempted robberies, is a convicted felon and was paid over $5,000 for his cooperation with the Government (332a, 333a).[2] And, as is usual with this breed of witness, he had lied on previous occasions and has not been prosecuted for other crimes he has committed which are just as serious as those involved here (342a, 243a, 250a, 128a).

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* We apologize for the length of this petition but it does involve two Petitioners with a number of Constitutional claims.

[2] Refers to the pages of the appendix in the United States Court of Appeals. To avoid confusion, reference to pages of the appendix attached to this Petition will be referred to parenthetically as A-1, A-2, *et cetera*.

Roberts said that the co-defendant John Pierce had conceived of a plan for robbing a money truck belonging to the First National Bank of Passaic County during the course of its pick-ups and deliveries in the City of Paterson, New Jersey (129a, 130a). He had apparently studied the route of this money truck and had located a place where he thought it could be easily intercepted and relieved of its contents (130a). He introduced this plan to Roberts who then joined the conspiracy. Roberts claimed that the Petitioners Callahan and Kapatos, were then invited to join this confederacy and did so (138a, 148a).

The robbery plan, as described by Roberts, consisted of Campbell, who would be driving a station wagon, waiting for the money truck while it was making its deliveries, and then at a fixed point he would pull in front of it, slowing it down to a stop at a designed place in front of a factory in Paterson, New Jersey (160a). When the money truck was stopped, Petitioner Kapatos, who was supposed to lie on the back floor of the station wagon armed with a machine gun, would raise himself up, pointing the weapon at the truck guards (148a). Petitioner Callahan and Roberts, who were to be positioned on opposite sides of the street where the truck was stopped, would then come up on the guards, in a flanking movement, taking them into custody (160a). John Pierce, operating a Buick automobile, would drive up and park immediately behind the truck, thus completing the pincer movement (148a).

Roberts claimed that two separate attempts to rob the truck were aborted because of unexpected developments.

On May 1st, 1964, the first occasion when the plan to ambush the money truck misfired, the station wagon driven by Campbell was on its way over to intercept the money truck when a motorcycle police officer was observed, which

understandably resulted in the plan's miscarriage (169a). All of the defendants then returned to New York in Kapatos' automobile (171a).

Several weeks later Roberts claimed a second attempt was made on the money truck which was also bungled (175a). The same plan of attack was followed, but this time Campbell, again driving the station wagon, made a wrong turn and missed the money truck (179a). Once again, the parties dispersed and returned to New York (171a).

With these two unsuccessful attempts on the money truck behind them, Roberts and Campbell became disenchanted with the project and withdrew from the conspiracy (183a, 280a). Consequently, from this point on there was no further proof produced of any conspiratorial activity on the part of these Petitioners. With the exception that Roberts claimed he saw Callahan in 1965. when Callahan is alleged to have made the equivocal comment "Aren't you sorry you didn't get a hunk of that score?". (189a).

On December 21st, 1964, the money truck was robbed, but an entirely different plan was employed. On that occasion, when the drivers of the money truck entered St. Anthony's Rectory in Paterson to pick up the week's collections, they were confronted by several masked men who took them into custody and stole approximately $500,000 (T 551).[3] Although the truck guards and several witnesses from the rectory testified, none were able to identify any of the men who committed the robbery.

Since none of the questions presented in this petition involve the overall evidence, we will discuss the facts pertinent to the issues raised here under the appropriate

[3] Refers to the pages of the original trial transcript.

point headings. However, it should be stated that the trial began on June 1st, 1970, before the Honorable Thomas F. Murphy and ended on June 17th, 1970, with the jury's returning a verdict of guilty on the only two counts submitted to them—Count 1, the conspiracy count, and Court 8, charging the transportation in interstate commerce of a stolen 1962 Mercury station wagon (T 1335). The other counts were dismissed on the Petitioners' motion, "because of the lack of venue", and Count 9 was dismissed for a failure of proof (T 1335).

On July 15th, 1970, the Petitioners Thomas Callahan and Thomas Kapatos were sentenced to five years on each count to run consecutively.

On March 22nd, 1971, the United States Court of Appeals for the Second Circuit unanimously affirmed their convictions.

Reasons for Granting the Writ

I. The decision below is in direct conflict with and in defiance of this Court's rulings regulating identification procedures to be used in criminal cases.

Procedures used by the police in identifying the Petitioner Kapatos as one of the co-conspirators in this case are so patently at odds with the controlling decisions of this Court governing proper methods of identification and are so serious a threat to the continuing vitality of those decisions, as to call for immediate corrective action.

On December 21st, 1964, a money truck was robbed by several masked men who secreted themselves in St. Anthony's Rectory. At the trial, no one identified the Petitioners Callahan and Kapatos as participants in this robbery. However, sometime before the robbery, a man

visited St. Anthony's Rectory on two occasions and requested food, which was given to him by Sister Olympia, a nun residing in the rectory (401a, 402a). At the trial, when Sister Olympia was asked whether she saw in the courtroom the man who came to the rectory on those two occasions, she replied, "I can't really state that I see him" (403a).

However, Sister Olympia and an F B I agent were permitted to testify about her previous identification of the Petitioner Kapatos as the man who allegedly came to the rectory on those two occasions.

Identification Procedure

On January 24th, 1965, a month after the robbery, Petitioners were subpoenaed before a federal grand jury in Newark, New Jersey. Both Petitioners appeared before that grand jury with counsel.[4]

When they arrived at the Federal Courthouse in Newark, they were ushered into the Grand Jury anteroom, where there were ten or fifteen other prospective witnesses. The Assistant United States Attorney in charge of the investigation made a point of calling out the Petitioners' names in the presence of these witnesses and "took great pains to make certain that each prospective witness had a good opportunity to view the defendants." 300 F. Supp. 519, at 523. The Petitioners were then taken into a suite of rooms, under the pretext of signing vouchers for their witness fees, where they were secretly viewed in a show-

[4] These facts and the ones that follow, are taken almost verbatim from Judge Motley's opinion in this case reported in 300 F. Supp. 519, at 523. See also Petitioners' motion in the trial court addressed to the improper identification procedures employed here, which have been made a part of the record on appeal.

up by Sister Olympia, the Government's key identification witness. Sister Olympia was stationed behind bookshelves in such a way that she could view persons on the other side without being seen herself (348a, 403a). The Petitioners and one other person were paraded in front of her "one at a time" (420a).

Sister Olympia testified in Court that at this show-up in Newark she recognized Kapatos as the man who came to the rectory for food sometime prior to the robbery (403a, 404a).

Apparently, a day or so after the robbery, Sister Olympia was shown photographs of Kapatos and Callahan, but was unable to identify either as the man whom she had seen on the two previous occasions at the rectory. On this occasion, she was unable to give any identifying features of the man who came to the convent (364a). However, on December 30th, more than a week after the robbery, and approximately two weeks after she had seen the man who came to the rectory, she was shown photographs again (371a). FBI Agent Laughlin admitted that Sister Olympia had "thought about the matter and she had an opinion with respect to Thomas Kapatos' being the person who visisted the convent" (379a).

All of Sister Olympia's testimony relating to her out-of-court identification of the Petitioner Kapatos was seasonably objected to by counsel (410a, 413a, 414a, 415a, 416a).

Thus it is undisputed that the Petitioners were forced to appear in a secret show-up, out of the presence of their lawyers, under the compulsion of a Federal Grand Jury subpoena. Both the Petitioners had hired lawyers to convoy them through the treacherous waters of this Grand

Jury proceeding. There can be no question that the prosecution had clearly focussed upon them; consequently, a critical stage in these proceedings had been reached. *United States v. Wade,* 388 U. S. 218 (1967).[5]

During the course of the trial, a judicial investigation was conducted into the constitutional propriety of the identification procedures used in Newark, and after a hearing the court concluded, ". . . that there was no violation of any of the due process rights of the defendant Kapatos" (348a-369a).

Since Kapatos had a retained attorney in the courthouse in Newark at the time he was secretly placed in the one-to-one show-up, his first complaint is that he was deprived of the assistance of his lawyer at a critical stage in the criminal proceedings. The Government's official misconduct brings Kapatos well within the reach of this Court's decisions establishing a defendant's right to his retained counsel at a crucial stage in a criminal prosecution. *Escobedo v. Illinois,* 378 U. S. 478 (1964); *Massiah v. United States,* 377 U. S. 201 (1964).

The Court will recall that Escobedo, the subject of a murder investigation, was denied the assistance of his lawyer, who was at the police station, but was not allowed to see his client. Here the Petitioners were surreptitiously separated from their lawyers and placed in a secret show-up, effectively depriving them of the advice of their counsel at a critical stage in these proceedings. As in *Escobedo,* they were deprived of "the guiding hand of counsel," so essentially needed to advise them of their rights in this

[5] We recognize that because these events occurred before June 12th, 1967, the Petitioners were ineligible for the *Wade* warnings, but they were certainly entitled to the assistance of their retained lawyers under the Sixth Amendment. *Escobedo v. Illinois,* 378 U. S. 478 (1964).

crucial situation. This was "the stage when legal aid and advice were most critical" to them. What happened at this show-up " 'would certainly affect the whole trial . . . since rights may be irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes' " at trial. 378 U. S. at 486.

As this Court pointed out in *Massiah v. United States*, 377 U. S. 201 (1964), at such a crucial stage in the prosecution, the Petitioners were ". . . as much entitled to such aid [of counsel] during that period as at the trial itself." 377 U. S. at 205. The Court there, expressing its alarm over such secret procedures, quoted from Judge Hays' moving dissent in the Second Circuit as follows:

> ". . . if such a rule is to have any efficacy, it must apply to indirect and surreptitious interrogations as well as those conducted in the jail house. In this case, Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent." 377 U. S. at 206.

Surely this language applies with equal force to our "surreptitious" show-up, because here Kapatos, like Massiah, did not know he was being put in a show-up and his lawyer had been deceived into thinking that his client was merely in a federal courthouse for the purpose of appearing before a grand jury. Had his lawyer been made aware of this clandestine activity, he could have insisted that he be present to observe the irregularities in the identification procedures, could have recalled any suggestive statements made by F B I agents to identifying witnesses, would have insisted upon his client's being placed in a traditional line-up, would have certainly objected to the highly suggestive "one-to-one" identification procedure, and thus could have more effectively cross examined those

who participated in the secret show-up. Once the Government is on notice that a defendant has a lawyer, it is obliged to honor that relationship and do nothing to interfere with his attorney's offering him assistance, whether or not a "critical stage" is reached.

In a word, Sister Olympia's very shaky and fragile identification of Kapatos could not be effectively challenged by his lawyer because of this official trickery. Thus, the Government, by separating the Petitioner Kapatos from his lawyer at this vital stage in the proceedings, effectively foreclosed him from "any meaningful defense."

Significantly Sister Olympia was the only witness out of 48 called by the Government, who identified Kapatos and in any way connected him with the robbery in New Jersey. It was this vital testimony that the jury asked to have re-read to them after their jury deliberations commenced (531a).

Aside from depriving the petitioner Kapatos of the assistance of counsel at this critical stage in this criminal case, the prosecution's forcing him into a secret show-up by the misuse of the grand jury process is indefensible and cannot under any circumstances be condoned. Courts have understandably been much harder on prosecutors when they engage in official deception or deceit in obtaining evidence from unsuspecting defendants.[6]

If the right to counsel is to remain meaningful, judicial fidelity to this Court's rule that no man should be deprived

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[6] See, *e.g.*, *United States ex rel. Everett v. Murphy*, 329 F. 2d 68 at 69, where the Court reversed a murder conviction where the defendant confessed after he was arrested ". . . on the pretext that the arresting officers had a warrant from the Domestic Relations Court because Everett's children were hungry. No such warrant existed." See also, *United States v. Murphy*, 222 F. 2d 698 (2d Cir., 1955), and *People v. Friedlander*, 16 N. Y. 2d 250 (1965).

of the assistance of counsel at a critical stage in a criminal case is essential. For this reason alone, and without regard to any of the other errors committed in this case, Kapatos' petition for certiorari should be granted.

The Identification was Impermissibly Suggestive

This Court was careful to point out in *Stovall v. Denno*, 388 U. S. 293 (1967), that aside from the right to counsel, identification procedures must meet due process standards of fundamental fairness in order to pass constitutional muster. It is uncontroverted that Sister Olympia was the only identifying witness in this case and her identification was most uncertain. The identification occurred more than a month after she claimed she saw Kapatos and her identification of him was the result of a most suggestive show-up in a one-to-one situation. And finally, of critical importance was her inability to identify him at the time of the trial. Consequently, her constitutionally impermissible identification became the sole basis of his conviction of these serious offenses and his resulting ten year prison sentence.

The constitutionally triumphant decisions of this Court in *Wade, Gilbert* and *Stovall* have spawned a mass of litigation which has reached almost unmanageable proportion. However, the case which most closely resembles the one at bar is *Foster v. California*, 394 U. S. 440 (1969), where an accomplice implicated the petitioner in an armed robbery of a Western Union office in California. As in our case, there was only one other identifying witness who corroborated the accomplice. This Court condemned the line-up procedures used there, which were manifestly fairer than the ones used here, and held:

"When this did not lead to positive identification, the police permitted a one-to-one confrontation between petitioner and the witness. This Court pointed out in *Stovall* that '[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned.' 388 U. S. at 302, 97 S. Ct. at 1972. *Even after this the witness' identification of petitioner was tentative.* So some days later another lineup was arranged. Petitioner was the only person in this lineup who had also participated in the first lineup. This finally produced a definite identification. 394 U. S. at 443. (Emphasis supplied.)

* * *

The suggestive elements in this identification procedure made it all but inevitable that David would identify petitioner whether or not he was in fact 'the man.' In effect, the police repeatedly said to the witness, 'This is the man.' See *Biggers v. Tennessee,* 390 U. S. 404, 407, 88 S. Ct. 979, 980, 19 L. Ed. 2d 1267 (dissenting opinion). This procedure so undermined the reliability of the eyewitness identification as to violate due process.

* * *

The respondent invites us to hold that any error was harmless under *Chapman v. California,* 386 U. S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). We decline to rule upon this question in the first instance. Accordingly, the judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion." 394 U. S. at 444.

The Court of Appeals, in a rather summary manner, ruled that "there was nothing suggestive about the way in which Kapatos was brought within the view of those behind the bookcases" and also concluded that the ". . . lineup was not in any sense custodial; Kapatos was not under arrest nor was he subject to restraint of any kind; . . ." (A-23).

As if that were not enough, the Court of Appeals announced an astounding new rule by holding:

> ". . . we think it proper to express our views that after the commission of a crime, in addition to the use of photographs, as permitted by *Simmons,* we can find nothing in *Wade, Gilbert, Stovall,* or any other court decision banning stratagems or deceptive practices in general or preventing law enforcement officers from putting witnesses in a position to see or photograph the suspect in the neighborhood of his home or his work, playing golf or doing anything else in a public place. *And all this, we think, can be properly done without letting the suspect know in advance that he is to be viewed or telling him he had a right to the presence of a lawyer.* [citing a number of circuit court decisions.]" (A-26 Emphasis supplied.)

What the Court of Appeals' opinion overlooks is that Kapatos' presence in the Grand Jury anteroom was by *compulsion.* He had been forced to appear there without choice, which of course, is quite different from viewing a suspect at the place of his employment or elsewhere and of course, what the Court of Appeals ignored was the prosecution's duty to advise Kapatos' lawyers that they had a right to be present at the time he was put through the "show-up" procedures.

Our situation is absolutely no different than one where a defendant is taken to the police station and is waiting to be placed in a line-up. If his attorney had appeared and said that he wanted to see his client, under the unmistakable language in *Escobedo* and *Massiah,* he would have an absolute right to confer with his client and be present while the defendant was placed in a show-up. The situation here is absolutely no different and requires the same ruling.

It is imperative for the Court to remember that Sister Olympia never identified Kapatos in his trial. Thus, the only identification supplied to the jury had its origin in the show-up in Newark, which was infected with the constitutional infirmities complained of here.

Consequently, this Court's, language in *Gilbert* is most relevant:

> "Quite different considerations are involved as to the admission of the testimony of the manager of the apartment house at the guilt phase and the eight witnesses at the penalty stage that they identified Gilbert at the line-up. That testimony is the direct result of the illegal line-up 'come at by the exploitation of [the primary] illegality.' *Wong Sun v. United States,* 371 U. S. 471, 488, 83 S. Ct. 407, 9 L. Ed 2d 441. The State is therefore not entitled to an opportunity to show that that testimony had an independent source. Only a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical line-up. . . . That conclusion is buttressed by the consideration that the *witness' testimony of his line-up identification will enhance the impact of his in-court identification on the jury and seriously aggravate whatever derogation exists of the accused's right to a fair trial.*" 388 U. S. at 272-274 (Emphasis supplied.)

The prosecutor in the Trial Court effectively exploited Sister Olympia's out-of-court identification in his summation, regaling the jurors time and time again with her out-of-court identification of Kapatos as corroboration for his understandably weak accomplice witness Roberts.[7] The

---

[7] "The best evidence in the case against Mr. Kapatos, the evidence that tells you without doubt that Charley Roberts was telling you the truth and that Kapatos was involved in this crime is the evidence of Sister Olympia.

* * *

(Footnote continued on following page)

vital importance of Sister Olympia's testimony is demonstrated by the jurors calling for the reading of her identification testimony during the course of their deliberations, before returning their verdict against the Petitioners.

Under this Court's clear language in *Foster* and *Gilbert*, a grant of this Petition is required.

II. The Search and Seizure Issue.

Seldom has there been so shocking and so unwarranted an intrusion upon the rights established by the Fourth Amendment to be secure in one's person against unreasonable searches and seizures. The decision below, sustaining the validity of that intrusion, is patently inconsistent with the Fourth Amendment's principles established by this Court and presents a recurring and important aspect of the constitutional search and seizure problem that deserves the full attention of this Court.

(Footnote continued from preceding page)

> Then she goes to the courthouse a month later, and she, along with many other people you heard testify, were put in the library and told to look through books and see if they could recognize anyone, and they were asked whether they could recognize people who they saw the day of the robbery, and she couldn't. She couldn't say that she saw that man the day of the robbery, but she could say and did say that she recognized one man as the man she had seen at the convent, and not only did she recognize his appearance, but she recognized his voice, because he was talking, and she remembered what he was talking about, and it was about having pictures taken.
>
> * * *
>
> Do you think Sister Olympia has any reason to come here and tell you a phoney story?
>
> What is good, ladies and gentlemen, is the fact that at the time it happened, shortly after it happened, then she could and she did make the identification. That is the reliable one. That is the one you can count on. What happens today, six years later, it is worthy of being suspect" (464a-468a).

On January 22nd, 1965, one month after the robbery of the money truck in New Jersey, a band of FBI agents descended upon Room 106 of the Ocean Haven Hotel in Miami Beach occupied by Thomas Callahan and a female companion. Callahan described in gripping detail how he was awakened by a knock on his motel room door and how upon his opening it, a number of FBI agents burst into his room (T 265). When he asked them what this was all about, he was told to keep quiet and put his clothes on (T 266). Callahan was then rushed into a police car and taken down to FBI headquarters (T 266).

While at FBI headquarters, the federal agents attempted to fingerprint and photograph him and sought to question him, but he declined to answer any questions and refused to be photographed or fingerprinted (T 266, T 274). He was then told to "empty your pockets" and he removed from them a quantity of money and a rubber band which was confiscated (T 271). The agents then made him remove his pants (T 272).

The version of the facts upon which the courts below relied as constituting the "credible evidence", however, was the testimony of only the FBI agent who performed the interrogating and the search of Callahan, agent Putz. Agent Putz was one of the three agents who brought in the Petitioner to FBI headquarters. According to Putz, and inexplicably contrary to the Court of Appeals' version of the facts, it was not until the Petitioner was at headquarters that he was informed of the subject of the questioning (33a).

Once at headquarters, Putz testified, Callahan refused to be photographed, fingerprinted or to answer any questions. The petitioner asserted that he was cognizant of his right to remain silent and elected to do so. However,

agent Putz asserted at the hearing that Callahan, in a manner inconsistent with his earlier refusal to assist the agents, permitted a close search of his person, and "voluntarily" removed the contents of his pockets and then his trousers.

Special Agent Putz claimed that he asked Callahan if he could "pat him down," and it is claimed that Callahan said "O. K." (34a). In the process of "patting him down," agent Putz said he turned Callahan's waistband over and there found a slit in Callahan's pants which contained a rubber band. He then asked Callahan if he could keep the rubber band, and Callahan is alleged to have said "yes" (35a). Putz claimed he put the rubber band around the money taken from Callahan's pocket and placed this evidence in an envelope which was subsequently sent to the FBI lab in Washington (35a).[8]

It was stipulated that the usual consent forms commonly used in a consent search were never executed here, nor were they ever offered to Callahan for his signature (T 240).

Agent St. Pierre, who participated in a pre-hearing briefing with the United States Attorney and agent Putz, contradicted the testimony of agent Putz in the crucial matters that show whether or not the search was by consent given freely or under duress and color of authority. The circumstances which prevailed at the hotel room leave little doubt that Callahan accompanied the agents only because of their authority and clear intent to "bring him in" for questioning.

Agent St. Pierre acknowledged that their assignment on January 22nd ". . . was to bring Callahan in." Specifically he testified:

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[8] The FBI agents exchanged other bills for the currency taken from Callahan, so that his money was returned to him (35a).

"Q. Well, the three of you went there and your specific assignment was to bring Callahan in?
A. Yes, sir" (111a).

Agent St. Pierre, in responding to defense counsel's questions, gave the following answers:

"Q. After the defendant indicated he wasn't going to tell him anything, wouldn't be fingerprinted, wouldn't be mugged, Agent Putz said, 'Empty your pockets?'
A. Right.

* * *

Q. To the best of your recollection, he said 'Empty your pockets?'
A. Yes.
Q. And he emptied his pockets?
A. Yes" (109a).

* * *

"A. Yes.
Q. Did Special Agent Putz say 'You don't have to empty your pockets?'
A. He did not" (109a).

At headquarters Callahan made it clear that he would not assist the agents in any way. However, the courts below deemed themselves controlled by Putz's testimony that the Petitioner voluntarily consented to the search of his person while refusing all other cooperation. That testimony was inconsistent with Putz's earlier description of the Petitioner's attitude toward cooperating and with agent St. Pierre's version of the character of Callahan's supposed cooperation.

There is no question that the search could only be conducted pursuant to the voluntary consent of the Petitioner. As agent Putz testified, there was no need to search for a weapon for the protection of the agents, and even though Callahan was a suspect, he was not under arrest and there was no justification for a search incident to an arrest (53a-55a). There was no warrant of any kind in this case.

In addition to the inconsistency inherent in the testimony of agent Putz and the contradictions of Putz manifest in agent St. Pierre's testimony, the official report which was dictated by the agents in concert also fails to harmonize with agent Putz's testimony (47a). The report, prepared by the agents and not a clerk or other person not present at the interrogation and search, states clearly that the rubber band was removed *by the petitioner* from his pocket with the currency which the rubber band circumscribed. The FBI report covering this search contained the following language relating to the removal of the money from Callahan's pocket:

> "It is noted that these bills were bound together by a thick, wide, yellow-colored rubber band"[9] (70a, 71a).

It is difficult to understand how this language in an official FBI report could be construed to mean that the rubber band was taken from another location and placed on the bills afterwards. Agent Putz's testimony was in direct contradiction to the official report prepared by the agents participating in the investigation.

After a judicial investigation was conducted concerning the propriety of this search, the Court simply concluded:

> "On the factual situation, which I think you would agree is the test as to whether or not his rights were violated, I don't believe Mr. Callahan, I believe the agents, and accordingly, I deny the motion to suppress and you have any exception" (T 302).

During the course of the trial, the rubber band was received in evidence against both Callahan and Kapatos (T 722-T 729). Expert and lay witnesses testified that the

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[9] This is the same rubber band Agent Putz claimed he located in a slit in the waistband of Callahan's trousers, and the one claimed to be illegally seized.

rubber band taken from Callahan was the same make, type and texture as that used to bind the currency which formed a part of the money taken from the First National Bank of Passaic County (T 783-T 793).

This rubber band was the very last piece of evidence mentioned in the prosecutor's summation to the jury when he proclaimed:

> "What else do we have as corroboration? . . . You have the rubber band" (479a, 480a).[10]

And thus, this critical piece of evidence was seared into the minds of the jurors in the very last moments of the trial, lest they forget it in their deliberations.

In summary, the only evidence showing voluntary consent of the search of the Petitioner is a portion of agent Putz's testimony. The balance of agent Putz's testimony, the testmony of agent St. Pierre and the official report, compel the conclusion that the consent was not voluntary, but was given under duress and coercion. It must be clear to

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[10] Earlier in his summation, the U. S. Attorney forcefully exploited this crucial piece of evidence by declaring:

> There was one thing that I can't forget. It is the most incredible piece of evidence I think I have ever heard of in a criminal case—a bloody rubber band, a little rubber band, which I am sure Callahan thought nothing of and the FBI thought nothing of it when they first got it. But isn't that a remarkable rubber band? [He then explained how it was identical to the rubber band used to bundle the stolen money.]
>
> * * *
>
> Don't you suppose that what probably happened is, Callahan had some money in that slit at one time, and at one time maybe he took it out, for one reason or another, and the rubber band, which was on it originally, just got left there? Don't you suppose that might have happened?
>
> Well, how many of you gentlemen have rubber bands in your pockets today, or walk around with rubber bands in your pockets? (463a, 464a).

the Court, that even the testimony of the Government fails to show clearly and convincingly that the Petitioner consented freely and intelligently.

Today, it is well settled that every search is *per se* unreasonable when made without a Magistrate's authority expressed through a validly issued warrant. This Court in *Katz v. United States,* 389 U. S. 347 (1967), declared in unmistakable language that all searches, with but a few specifically established exceptions, conducted "outside the judicial process, without prior approval by a judge or magistrate are *per se* unreasonable under the Fourth Amendment . . . ." 389 U. S. at 357.

The Government's claim that the victim of an unreasonable search waived this Fourth Amendment protection must be established under a very heavy burden of proof. *Miranda v. Arizona,* 384 U. S. 436 (1966); *Bumper v. North Carolina,* 391 U. S. 543 (1968). Although a person may consent to a search, such consent must be proved by "clear and positive testimony." *Judd v. United States,* 190 F. 2d 649 (D. C. Cir. 1951).

The courts below did not employ this standard in assessing the government's evidence bearing on whether Thomas Callahan voluntarily consented to this search. The issue was not whether the Court "believed" Callahan or the federal agents, but whether the government established through their own independent proof, clearly and convincingly, that the Petitioner had waived his constitutional rights under the Fourth Amendment and, thus, consented to the search.

The Court of Appeals avoided the issue of burden of proof and simply held that ". . . whether or not such consent has been given is primarily a question of fact, better

left to the trial judge, who must pass upon the credibility of witnesses." (A-17) The real issue, disregarded by the courts below, is the standard of proof that must be maintained in measuring the constitutionality of the search.

A grant of certiorari is necessitated in this case because consent searches are being relied upon by prosecutors with increasing frequency today. We suspect that in many cases this approach is used to avoid the establishment of probable cause, or time-consuming paperwork, and thus the protection against unreasonable searches often depends upon the difficulty or ease with which the prosecution can establish that the defendant has consented to what otherwise would be an unconstitutional invasion of privacy. Consequently, these consent searches continue to raise increasingly difficult questions.

It is most unfortunate that these police searches are usually conducted behind the closed doors of police precincts, because the dangers of over-reaching against a lone suspect under such circumstances are obvious. Such a situation is inherently coercive, and its very existence is irreconcilable with the possession of a form of mental freedom on the part of a lone suspect against whom this full coercive force is brought to bear. And usually the uncorroborated court testimony of the defendant, as in Thomas Callahan's case here, about how he was searched will seldom be heard over the testimony of the officers who conducted it. Recognition of these realites must have been responsible for this Court's establishment of the strict tests announced in *Miranda* and *Bumper, supra.*

It is an insult to the intelligence of any court to suggest that a man who is dragged out of his hotel room in the custody of FBI agents, hauled down to FBI headquar-

ters, and who refuses to be photographed, fingerprinted, or answer any questions—can be deemed to have consented to a search of his pockets, particularly when he has been ordered to "empty them out."

We are grateful to the candor of at least some of the FBI agents who admitted that their assignment was to "bring Callahan in;" confessed that he was directed to "empty your pockets;" and we are most thankful for the official FBI report which states in clear and unequivocal language that when the money was taken from Callahan's pocket, the ". . . bills were bound together by a thick, wide, yellow-colored rubber band."

The test which must be followed by the appellate courts in determining a consensual search and seizure is actually two-pronged. The first task of the appellate court is to discern what testimony constitutes the credible evidence. The second task incumbent upon the appellate court, which was not done here, is to ascertain whether the credible evidence shows clearly and convincingly that the consent was voluntary. *Wren v. United States,* 352 F. 2d 617 (10th Cir., 1965); *Villano v. United States,* 310 F. 2d 680 (10th Cir., 1962).

It is beyond cavil that the Court should proceed reluctantly and with noticeable hesitation to decide that a fundamental right has been waived. *Johnson v. Zerbst,* 304 U. S. 458 (1938); *Cipres v. United States,* 343 F. 2d 95 (9th Cir., 1965), *Cert. denied,* 385 U. S. 826; *Villano v. United States, supra.* It is in this regard that the court below seems to have ignored the teachings of this Court. The evidence adduced at the hearing below shows clearly that the petitioner was taken into custody for the purpose of interrogation. As in *Villano v. United States, supra,* the initial intrusion by the FBI agents was sudden and at an un-

natural hour. Despite suggestions that the petitioner was advised that he was not compelled to accompany the agents to the FBI headquarters, the credible evidence in this case clearly demonstrates that the petitioner was coerced by the color of authority inherent in the presence of the three FBI agents in his hotel room.

The Court of Appeals, relying on its earlier decision in *Curiale v. United States,* 414 F. 2d 744 (2d Cir., 1969), seems to have adopted a policy which ignores this Court's admonitions against finding a waiver of fundamental rights unless a waiver is shown by clear and convincing evidence. In the present case, as in *Curiale,* the Court of Appeals found that the "consent" to a search was given as a ruse intended to divert the suspicions of the authorities. The unacceptable catalyst in this type of rationale is the reference to the seized evidence which subsequently served to convict the defendant. That reference was employed by the Court of Appeals to justify the search. In its opinion in the present case, the Court concluded its discussion of the search and seizure question by pointing out the relevance of the rubber band seized from Callahan. (A-17)

It should be obvious that such "bootstrap" reasoning seriously threatens the basic purposes of the Fourth Amendment, namely to protect citizens from lawless searches and seizures under color of authority and to dissuade the authorities from repeating such conduct. As the Court of Appeals for the Tenth Circuit has phrased it, ". . . certain it is that an unlawful search, conceived in evil, is not baptized in maturity by the success of search." *Villano v. United States,* 310 F. 2d 680, 684.

This Court has determined that consent to a search may be implied only under certain narrow circumstances. Thus, in *Frazier v. Cupp,* 394 U. S. 731 (1969), the Court held that

the seizure of clothing from a duffel bag shared with another individual was reasonable where the consent was furnished by the other individual.

In *Stoner v. California,* 376 U. S. 483 (1964), however, the Court refused to find implicit in an individual's use of a hotel room the authority on the part of a hotel clerk to consent to a search of the individual's room.

The Court of Appeals dismissed the question of consent as one of fact, "better left to the trial judge, who must pass upon the credibility of the witnesses." Abandoning its duty to act slowly and with restraint in finding a waiver of the fundamental protection afforded by the Fourth Amendment, the court below unjustifiably concluded that Callahan consented to the search believing he could dispel all suspicion by cooperating. By some extraordinary logic, the court determined that the Petitioner, believing that he had no incriminating evidence on his person, freely consented to the search by the FBI agents.

A conclusion of this sort is virtually a presumption of guilt which has not been demonstrated by the credible evidence adduced at the suppression hearing. Of critical significance is the manner in which the Court of Appeals has ignored the dictates of this Court to "indulge every reasonable presumption *against* the waiver of fundamental constitutional rights . . ." *Johnson v. Zerbst,* 304 U. S. 458, 464 (1938; emphasis supplied).

In reaching this conclusion, which is inconsistent with the testimony of the FBI agents themselves, the Court failed to implement the crucial second part of the two-pronged test as to voluntary consent to the search and seizure. The Court neglected to consider, as a question of law, whether the credible evidence clearly and convincingly

showed an unequivocal, specific and intelligent waiver of the Fourth Amendment right against unreasonable searches and seizures.

The uncontroverted evidence in this case reeked of the usual, and all-too-commonplace, practice of "bringing people in" to question them. Consequently, it was urged in the court below that where the police have neither warrant nor sufficient cause for obtaining one, and so seek permission to search one's person, he is entitled to be advised of his rights under the Fourth Amendment, *i. e.* that he need not submit to such a search. Certainly, the reasoning in *Miranda, supra,* pertaining to the right to remain silent, applies with equal force to one who is about to be searched. For in the absence of these neutralizing warnings, custodial pressures weigh heavily against waiver of the right to remain free from a search and invalidate any consent to conduct such a search which is based upon a person's lack of knowledge of his rights. At the very least, when a person is placed in such a custodial situation, he should be advised that if he refuses permission, the police will respect his decision. *Wren v. United States,* 352 F. 2d 617 (10th Cir., 1965). See *United States v. Nikrasch,* 367 F. 2d 740 (7th Cir., 1966) holding that since defendant was "then in custody" and "had not been apprised of his Fourth Amendment rights . . . no true consent had been given." *United States v. Blalock,* 255 F. Supp. 268 (E. D. Pa., 1966), holding that a failure to warn the defendant of his right to refuse a search rendered waiver unintelligent, and *United States v. Moderacki,* 280 F. 2d 633 (D. Del., 1968). In *United States v. Jardan,* 399 F. 2d 610 (2nd Cir., 1968), such advice was actually given by the FBI agents.

It only remains to be said that no member of this Court can be other than unhappy about the unleashing of this raw police power on Thomas Callahan and the brazen FBI testimony in the trial court contrived to sustain this search. This Court has pointed out before that decisions condemning these irregular police practices, act to protect the security of the entire community. For they serve as a safeguard against the most terrifying symbol of a police state, the ominous rap upon a householder's door in the middle of the night and the subjecting of citizens to unheralded searches by policemen who have become masters rather than servants of the law. When courts become indifferent to the abuse of these constitutional rights, we are well on our way to losing them. For lurking in the dark shadows of these low visibility searches is a threat to everyman's security and privacy.

For all of these reasons the petition for certiorari should be granted.

III. The decision below raises anew the unresolved constitutional question concerning the use of hearsay evidence before a grand jury.

No less than 48 witnesses were called by the Government in this case to supply evidence relevant to the robbery charges against each of these petitioners. *None of them were ever produced before the Federal grand jury which indicted the petitioners, although virtually all of them were available* (430a). Instead, all of this evidence was strained through the appealing voice of an FBI agent, who merely summarized this hearsay proof before the grand jury.

Defense counsel understandably complained about these inexcusible Government tactics and asked that the indictment be dismissed (430a). The Court denied the motion, but marked the grand jury minutes as a court exhibit.

Certainly, if the grand jury had known that the witnesses Devita (T. 178), Masciuloi (T. 203), Pascucci (T. 211), McGowan (T. 232) and Sister Olympia, who were all present at the robbery, could not identify the petitioners or if they had been able to hear and see Charles Roberts say that the petitioner Callahan did not participate in stealing the car in the robbery, nor did he transport it to New Jersey, there is a high probability that the petitioners would not have been indicted. Surely this conclusion is confirmed by the length of time the jury deliberated in this case and its repeated requests to have the testimony of Sister Olympia read.

This Court's decision in *United States v. Costello,* 350 U. S. 359 (1956), which approved the use of hearsay evidence before a grand jury to prove the complicated details of an income case has been distorted beyond recognition by prosecutors throughout the country. Here the Government's tactic of not calling before the grand jury the four priests, the caretaker, the two guards, and all the other witnesses at the scene of the robbery or the expert witnesses who testified about the rubber band found on Callahan, is indefensible.

The Court of Appeals startling statement concerning the Government's failure to produce any factual witnesses before the grand jury on the grounds "it would have served no useful purpose to have produced this array of witnesses or any of them before the grand jury" because "the only result would have been needless expense to the Government and great inconvenience to the witnesses,

many of whom lived at a considerable distance from the Federal Courthouse in New York City" is indeed disappointing (A-17).

It is undisputed that some of these witnesses lived in Newark, New Jersey, but surely the integrity of the grand jury process must, of constitutional necessity, take precedence over a toll charge on the George Washington Bridge, and the secrecy of the grand jury room would have afforded the Government witness, whose life it is claimed was in jeopardy, ample protection.

This unseemly strategy on the part of the Government has been repeatedly criticized by the Court of Appeals for the Second Circuit. See *United States v. Umans*, 368 F.2d 725 (2d Cir., 1966); *United States v. Beltram*, 388 F.2d 449 (2d Cir., 1968); *United States v. Payton*, 363 F.2d 996 (2d Cir., 1966); and *United States v. Arcuri*, 405 F.2d 691 (2d Cir., 1968). Although that court has never dismissed an indictment where the Government presented their whole prosecution through a conduit witness in the form of hearsay evidence, leading members of that court have vigorously dissented in some of these cases.

Despite the Second Circuit's repeated warnings to prosecutors that these ill-advised tactics will not be tolerated, the Government continues to exploit this unfair advantage as exemplified by this case. To have deliberately withheld from a grand jury the testimony of 48 witnesses, including identification witnesses, experts, an accomplice witness, and all FBI agents in a case as close as this, is intolerable.

We do not suggest that all 48 witnesses should have been produced before the grand jury, but certainly, in a case of this magnitude, the Government was obliged to produce

enough of them to satisfy a grand jury that there was probable cause for an indictment. Surely, if the grand jury could have heard Sister Olympia testify that she could not identify Kapatos, rather than hearing an agent who may have testified that she on some previous occasion identified him, their judgment to indict might have been quite different.

Judge Friendly's dissent in *United States v. Payton, supra*, is most relevant here:

> "If, in these narcotics peddling cases, the Government insists on pressing *Costello* to the point of offering a Grand Jury only hearsay testimony by a surveilling agent when that is no apparent reason save a transparently unworthy one for not producing the agent with first-hand knowledge, it must make clear to the jurors the shoddy merchandise they are getting so they can seek something better if they wish; thus pressing the prosecutor for more reliable evidence—particularly important in these narcotics prosecutions, where there is often a problem of the reliability of an agent's identification—is the Grand Jury's historic function. In the *Costello* case there was excellent reason for limiting the presentation to the three agents who summarized financial evidence, proof of which required 141 other witnesses and 368 exhibits at the trial, and the agent's lack of direct knowledge must have been apparent.
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> * * *
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> . . . I nevertheless think a proper respect for the constitutional requirements of indictment and the 'high place' held by the Grand Jury 'as an instrument of justice' . . . forbids our sanctioning what happened in this case. 363 F. 2d at 1000."

For the Government to keep *all* of their witnesses from the grand jury in a common bank robbery case is unpardonable. Unless prosecutors are taught once and for all

that these irregular practices will not be tolerated, the traditional safeguards of a federal grand jury will continue to be imperiled.

We are compelled to question the propriety of the Court of Appeals' excusing constitutional deficiencies before a grand jury by acknowledging that the prosecutor explained to that body why the failure occurred. Telling the grand jury that they are receiving some hearsay testimony or explaining the unavailability of a particular witness might be permissible within certain limits, but surely the Government's failure to call any one of the 45 factual witnesses before the grand jury, under no circumstances can be cured by an explanation.

In making these constitutional claims, the petitioners are terribly handicapped in that they have no way of knowing what was said to the grand jury, since we have been denied access to those records. We are simply confronted with the Government's gratuitous statements and the Court's disclosure that the grand jury was told of the hearsay nature of the evidence presented to it. Certainly the policy pronouncements made by this Court in *Alderman v. United States*, 394 U. S. 165 (1968), require, at the very least, a remand so that a hearing can be conducted to fully investigate the constitutional propriety of the Government's failure to present any of their 45 factual witnesses to the grand jury which returned the indictment in this case. For surely, where there is a factual dispute of such constitutional magnitude, an adversary hearing is required to substantially reduce the incidence of error possibly made by the judicial officer because of a lack of familiarity with the petitioners' claims which cannot be fully made without access to the grand jury testimony.

If the Government's actions here are approved by this Court, then surely the function of a grand jury to provide some security to all men against unjust, hasty and oppressive prosecutions has been virtually emasculated. For all these reasons, and because the Government's corruption of the grand jury process in this case goes far beyond any previously sanctioned by this Court, the petition for certiorari should be granted.

IV. Petitioner Callahan's mere participation in the overall conspiracy to rob a money truck was insufficient to sustain a separate conviction of the substantive offense of transporting in interstate commerce a stolen vehicle in which the Government concedes he in no way participated.

The petitioner Thomas Callahan was convicted under the Eighth Count of the indictment of the substantive offense of transporting in interstate commerce a stolen 1962 Mercury station wagon in violation of § 2312 of Title 18.

He was not charged with conspiring to transport that stolen vehicle in interstate commerce. No proof was offered by the Government that Thomas Callahan either transported or aided in the transportation of that stolen car in interstate commerce. Thus, the facts relevant to the use of a 1962 Mercury station wagon in the two attempted robberies should be reviewed.

Once the plan to rob the New Jersey money truck was conceived, it was decided that a station wagon would be needed to implement that plan. Roberts testified that everyone was to keep on the look-out for a station wagon (151a). However, before the petitioner Callahan, or anyone else, did anything about obtaining a station wagon, Roberts testified that he received a call from Kapatos, who told him that he had "secured a station wagon, and for us not to bother" (151a).

The morning after Roberts received this telephone call, he met with Pierce and Kapatos outside Pier 90 in New York City, and he claimed Kapatos told them he had stolen the station wagon" . . . outside the Copacabana in New City" and that ". . . he was going to change the plates on the station wagon and take it out to New Jersey" (151a). It is conceded by the Government that Thomas Callahan was not present at this meeting, and it is not claimed that he had any knowledge of these conversations.

After changing the license plates on the station wagon in New York City, the station wagon was transported from New York to Ft. Lee and then to Paterson, New Jersey, by Pierce, Roberts and Kapatos, where it was stored (153a). It is undisputed that Thomas Callahan was not with these other defendants when the stolen car was transported to New Jersey.

After the station wagon had been taken to New Jersey and stored in the garage there, it was never returned to New York (171a).

The Court will recall that the robbery plan consisted of the money truck being intercepted by the station wagon which was supposed to have been driven by Campbell with Kapatos in it as a passenger (160a). On both of the occasions that Roberts claimed an attempt was made to rob the money truck, Callahan never rode in the stolen station wagon (169a). On each of these occasions Callahan rode in the Buick automobile, which was not charged as having been transported in interstate commerce (160a).

On each occasion when Roberts claimed the attempted robbery miscarried, all the defendants returned to New York in Kapatos' automobile, which was not stolen (171a).

Consequently, it is uncontroverted that petitioner Callahan was never present when the actual theft of the station wagon was discussed, did not accompany the other defendants when it was transported to New Jersey, and at no time was ever a passenger in the station wagon, either when it was operated in New Jersey or New York.

This total failure of proof undoubtedly accounts for the following remarks made by the prosecutor in his summation:

> "There is no evidence presented that Callahan had anything to do with the actual driving across the state line of that Mercury station wagon, no evidence at all, but the Government is proceeding on the theory that Callahan was an aider and abetter . . ." (459a).

This wide void in the Government's proof was responsible for the following remarks made by the Court:

> ". . . What troubles me with regard to Count 8 is the defendant, Callahan, and I recall no testimony—probably it is my fault—that relates to Callahan insofar as it is alleged that he, together with Kapatos and others, transported the car" (T 1335).

The Second Circuit Court of Appeals affirmed the petitioner Callahan's conviction of transporting a stolen car in interstate commerce on the theory that he aided and abetted that offense by merely being present when a statement was made by another co-conspirator that ". . . . each and every one of us was to be on the alert in regard to stealing a station wagon" (2103). The Court of Appeals concluded:

> This [the statement that Callahan acquiesced in] was all that was necessary to warrant a finding by the jury that he aided and abetted others, including Kapatos, who actually stole the car (2103).

This new and unwarranted rule announced by the Second Circuit Court of Appeals is in direct conflict with this Court's decision in *Nye and Nissen v. United States,* 336 U. S. 613 (1949), requiring this Court to take immediate corrective action.

This Court in *Nye and Nissen,* quoting the language of Judge Learned Hand, held:

> In order to aid and abet another to commit a crime, it is necessary that a defendant "in some sort associate himself with the venture, that he participate in its as in something that he wishes to bring about, that he seek by his action to make it succeed" 336 U. S. at 619.

In the two decades since *Nye and Nissen,* a number of Circuit Courts have strayed from these moorings.[11] This case marks the extent of that drift, for in reality the petitioner Callahan was convicted of aiding and abetting in the transportation of a stolen car and sentenced to five years in prison merely because he was present when one co-conspirator said everyone should keep a look-out for a car to steal. It is conceded that Callahan did nothing more than hear that comment. He in no way participated in the theft of the car; wasn't present when its theft was acknowledged by the other co-conspirators; did not know that it was transported to New Jersey; and never rode in the car while it was in New Jersey.

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[11] See, *e.g., Davis v. United States,* 362 F. 2d 964 (D. C. Cir. 1966), *cert. denied,* 386 U. S. 965, where Chief Justice Burger, as a Circuit Judge, sought to limit the amorphous development of the law of aiding and abetting; *Mack v. United States,* 326 F. 2d 481 (8th Cir. 1964), *cert. denied,* 377 U. S. 947, where the appellant's mere presence at the scene of the crime, in the company of the principal defendant, was held to be sufficient evidence of committing the substantive crime as an aider and abettor; *Lambert v. United States,* 261 F. 2d 799 (5th Cir. 1958), where the appellant, convicted as an aider and abettor, merely acquiesced in the stealing of an automobile and accompanied the principal across state lines in the stolen vehicle.

On the other hand, courts like the Eighth Circuit have adhered rigidly to this Court's rule in *Nye and Nissen* holding that a person who actually rode in a stolen car across state lines could not be considered to have aided and abetted in its transportation since he did not by his action seek to make it succeed. *Baker v. United States,* 395 F. 2d 368 (8th Cir. 1968).

If the rule fabricated by the Second Circuit were to become the law of this land, it would open the way for the conviction of a conspirator more than once for the same conspiracy, by charging him with aiding and abetting in the substantive counts committed by other co-conspirators, thus placing him twice in jeopardy for the same offense. The petitioner Callahan was convicted of conspiring to commit the robbery in New Jersey. That conviction must, of constitutional necessity, include all aspects of the plans to commit the robbery, including securing automobiles, weapons and any other implements needed to effectuate the robbery. For his participation in that conspiracy he has been sentenced to prison for five years. However, under this Court's carefully delineated ruling in *Nye and Nissen,* he cannot be charged with the actual theft and transportation in interstate commerce of a stolen vehicle which he did not ". . . bring about or associate himself with." If that were the case, then in the case at bar, if one of the co-conspirators had killed a post office worker in stealing the car, all of the co-conspirators would share in the liability for that murder, as aiders and abettors. Such a concept is clearly repugnant to our more basic criminal disciplines.

Even in those cases where words, and not actions, have been held sufficient to constitute aiding and abetting, other circuit courts have held that the words must amount ". . . to counselling or other assistance in the prohibited activity." *Grimes v. United States,* 379 F. 2d 791, 795 (5th Cir.

1967), *Cert. denied,* 389 U. S. 846; *United States v. Honeycutt,* 311 F. 2d 660 (4th Cir. 1962). However, in the case at bar, Callahan certainly never counselled or in any way induced the theft of the Mercury or its transportation.

There has been an alarming increase in recent years of the use of the doctrines of conspiracy or aiding and abetting by public prosecutors to draw peripheral defendants into the wake of another man's criminal conviction. This Court has always recognized the dangers inherent in these dragnet theories of criminal justice. The Court of Appeal's opinion below marks a new high in unnecessarily expanding this dangerous doctrine.

For all of these reasons, this Court should grant this Petition to ensure compliance by Circuit Courts with the rule of aiding and abetting announced in *Nye and Nissen.*

Conclusion

It only remains to be said that no member of this Court can be other than disappointed about the ruthless tactics used in searching and identifying these petitioners and presenting their case to the Grand Jury. If only the fate of men charged with bank robberies were involved in cases such as this, our courts might remain indifferent to their being victimized by the police tactics exemplified by this case. However, as this Court has said many times, decisions which condemn the irregular police practices engaged in here, act to protect the security of the entire community.

What was done to these petitioners offers an ominous omen of things to come if some constitutional limits are not placed on these prosecution tactics. It is fair for us to assume that without some intervention by this Court,

federal prosecutors will continue to exploit the unfair procedures used here, and approved by the Second Circuit, and thus the safety and security provided to all men by these constitutional protections will be lost and then no man will be safe.

Respectfully submitted,

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Dated: April 27, 1971.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 444 and 462—September Term, 1970.

(Argued January 20, 1971.)

(Decided March 22, 1971.)

UNITED STATES OF AMERICA,

Appellee,

v.

THOMAS CALLAHAN and THOMAS KAPATOS,

Appellants.

Docket Nos. 35231 and 35642.

Before: Medina, Hays and Anderson, *Circuit Judges.*

Appeals from judgments of the United States District Court for the Southern District of New York, Thomas F. Murphy, Judge.

Thomas Callahan and Thomas Kapatos appeal from judgments of conviction, entered upon the verdict of a jury, for conspiracy to violate the Federal Bank Robbery Law, 18 U. S. C. Section 2113, in violation of 18 U. S. C. Section 371 and for transportation of a stolen motor vehicle in interstate commerce in violation of 18 U. S. C. Section 2312. Affirmed.

John R. Wing, Assistant United States Attorney, New York, N. Y. (Richard Davis and Jack Kaplan, Assistant United States Attorneys, and Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, New York, N. Y., on the brief), for appellee.

Herald Price Fahringer, Buffalo, New York (Herald Price Fahringer, Buffalo, New York, for appellant Thomas Callahan, Theodore Rosenberg, Brooklyn, New York, for appellant Thomas Kapatos, and Lipsitz, Green, Fahringer, Roll, Schuller & James, Buffalo, New York, on the brief), for appellants.

MEDINA, Circuit Judge:

Thomas Callahan and Thomas Kapatos appeal from convictions for conspiring to rob a bank money truck in violation of 18 U. S. C. Section 371 (1964) and for transporting a stolen automobile in interstate commerce in violation of 18 U. S. C. Section 2312 (1964). Each of the appellants was sentenced to consecutive five-year terms on each count. The grand jury had returned a nine-count indictment against Callahan and Kapatos, but most of the charges were dismissed for lack of venue and one for failure of proof.

On December 21, 1964 at Paterson, New Jersey, four armed men made off with over $500,000 in United States currency that was being transported in a panel truck of the First National Bank of Passaic County, the deposits of which were insured by the Federal Deposit Insurance Corporation. Not a penny of this large sum has ever been recovered. The robbery was planned with such meticulous attention to detail that the robbers made their escape leaving behind only the handcuffs and pieces of cord used to truss up the guards and others. The task of solving this

crime was one of unusual difficulty but, as a result of several years of persevering investigation, the bits of evidence pieced together at the trial furnished a firm basis for the finding of the jury that both Callahan and Kapatos were beyond a reasonable doubt guilty of the crimes charged.

We are asked to reverse and to dismiss the indictment or to remand the case because of numerous errors alleged to have been committed by Judge Murphy in his rulings at the trial. Some of these claims of error we pass over as clearly lacking in merit. Others can only be understood when viewed against the background of a most complicated aggregate of various detailed proofs, to which appellants' briefs make only passing reference, and which are woefully scrambled in the Government's answering brief. After these items of proof have been pieced together in proper perspective, we believe the points of law will be more readily understood.

Callahan is enlarged on $100,000 bail pending the disposition of this appeal. Kapatos is serving a seven and one-half year sentence on an earlier conviction in the Southern District of New York for armed theft of an interstate jewelry shipment, to which further reference will be made later.

I.

The Development of the Conspiracy and How It Resulted in the Robbery at St. Anthony's Rectory on December 21, 1964

The Market Diner near Pier 90 at West 51st Street in New York City was a sort of gathering place for men who more or less worked in the neighborhood. The individuals with whom we are concerned in this case are Thomas Callahan, Frank Campbell, Thomas Kapatos, John Pierce,

Henry Speditz—all named as defendants in the indictment —and Charles Roberts, a member of the conspiracy to rob the bank's money truck, who testified for the Government. Most or all of these men had served terms of imprisonment for the commission of crimes of violence, possession of firearms and the stealing of automobiles.

Roberts, who had known Callahan, Campbell, Kapatos, Pierce and Speditz for many years, testified that Pierce, who worked on Pier 90, came to him in January or February, 1964, and said he had discovered a "score" or opportunity to obtain a large sum of money by robbing a bank money truck in Paterson. The two men then proceeded to Paterson in Pierce's car, which was "clean." This meant it was not stolen but was legally owned by Pierce. They surveyed the terrain, became familiar with the route taken by the money truck on Mondays as it delivered bags of currency from the main office to the various branch banks, and returned confident that the scheme to rob the money truck was feasible. They had looked in the money truck and had seen the bags. Pierce even went right into the main office of the bank and saw the bundles of currency put in the bags. So they knew money was in the bags. It was noted that a simple panel truck, rather than an armored car, was used, and there were only two guards. Then Campbell joined the others in the venture, and Pierce suggested they bring in his friend Kapatos who was said to possess several garages in New Jersey, in one of which he had a stolen car loaded with all the equipment and paraphernalia that would be needed in the robbery, such as a machine gun, pistols, Army clothes and field jackets and so on. There were several further trips in Pierce's car to reconnoiter the Paterson area and Kapatos liked what he saw. It was he who suggested the plan originally adopted.

This first plan was to intercept the money truck as it followed its regular Monday route on a street with an open lot on one side and a long factory with high dingy windows on the other. There were intersecting streets before and after passing the factory block. Kapatos's plan was to have a stolen station wagon drive in front of the money truck, slow it down, and then Kapatos, lying on the floor of the station wagon, was to drop the rear window and point his machine gun at the guards in the money truck a few feet behind. Another stolen car with a driver was to lie in wait in one of the side streets while the two other men approached the money truck from either side and overpowered the guards. Then the driver of the second car was to come up behind the money truck to take the loot.

It was apparent that this scheme required a fifth man, and Kapatos brought in his friend Callahan, who said "If Kapatos likes it, I like it." This was in late March or early April of 1964. After further driving around Paterson in Pierce's car, renting a store which they could use as a place of refuge if things went wrong and a small private garage "underneath a house" in which to keep a stolen car, the five men met in New York to discuss what to do next. After some talk it was agreed by all that it was necessary to steal a station wagon and "each and every one of us was to be on the alert in regards to stealing a station wagon." Within a week Kapatos phoned Roberts at his home in Astoria and said he had stolen a station wagon outside of the Copacabana night club in New York City, and for "the rest of us" not to bother about it. He described it to Roberts as long, having lots of windows, a light blue or light green Oldsmobile, with an air conditioning unit in it. It turned out to be a 1962 Mercury. So Kapatos brought the stolen station wagon to Pier 90, and he and Roberts, together with Campbell and Pierce,

changed the plates in the street and the four men started for New Jersey. Kapatos drove the station wagon and the others followed in Pierce's car. The time of this is given by Roberts as "some time in April of 1964." On the way out to Paterson they stopped at Fort Lee where Kapatos lived in an apartment house. Upon arrival in Paterson the stolen station wagon was placed in the little one-car garage they had previously rented, and all four returned to New York in Pierce's car.

We pause for a brief digression, as this station wagon will become one of the important links in the chain of proof corroborating the testimony of Roberts. We shall in a moment review Roberts's description of two abortive attempts to rob the money truck in the street alongside of the factory. Roberts participated in these two abortive attempts and then he and Campbell retired from the conspiracy. Until Roberts told his story to the FBI several years after the spectacular robbery at St. Anthony's Church Rectory on December 21, 1964, neither the FBI nor anyone in the prosecutor's office investigating the crime had ever heard of any station wagon, as no station wagon played any part in the robbery at the Rectory. Roberts's recital of the facts concerning the first two abortive attempts, however, gave the FBI for the first time his statement that "some time in April" 1964 Kapatos had stolen a station wagon, containing an air conditioning unit, from the street near the Copacabana in New York. So, upon further investigation it was discovered the police record indicated that such a station wagon had been reported as having been stolen at the Copacabana on April 18, 1964. And a member of the police force of East Paterson testified this station wagon was found abandoned in the extreme westerly corner of a parking lot at the Elmwood Shopping Center, near Paterson on Route 4, on July 25, 1964. The

owner, Edward Lebowitz, was located and he confirmed the fact that the car was stolen at the Copacabana on April 18, 1964. And this very parking lot at the Elmwood Shopping Center was the place where Roberts had said the robbers switched cars at the time of the two abortive attempts to rob the money truck. That Roberts could have manufactured out of whole cloth the story about the station wagon with an air conditioning unit stolen from the Copacabana and then have it all fortuitously come true strains credibility far beyond the breaking point.

It requires no more than a few sentences to describe the two abortive attempts in the Spring of 1964. Five men participated in each of these two attempts, including Roberts. They drove out to Paterson in Kapatos's "clean" Oldsmobile after picking up Kapatos's stolen Buick at his garage in West New York, N. J. with all the equipment. At the Elmwood Shopping Center they left the "clean" car, then in the stolen Buick they proceeded to the garage "underneath the house", where Campbell and Kapatos picked up the stolen Mercury station wagon. Callahan and Roberts were at their respective stations in the factory street, while Pierce at waiting in the stolen Buick, but the money truck went by and no Campbell and Kapatos in the stolen station wagon. They arrived in a minute or two and said Kapatos thought a police officer was observing them and he called the deal off. On the next abortive attempt two weeks later they did the same thing but Campbell made a wrong turn and the money truck went by. This led to an explosive scene with Kapatos heaping abuse upon Campbell and generally making himself objectionable. So Roberts and Campbell pulled out of the conspiracy. But the others urged them from time to time to return, which they refused to do. Another incident that might have contributed to this split-up was a conversation about four

new hand guns Kapatos had received from Boston. He said they were of superior quality and should be used in the robbery in Paterson. Callahan violently disagreed on the ground that if any of them was picked up with one of these guns in his possession it might be identified as having been used in some robbery in Massachusetts and then they would be in real trouble. The rest agreed with Callahan. Campbell died of a heart attack on October 4, 1964.

We must reconstruct the actual robbery on December 21, 1964 from the proofs of what occurred and by piecing together the testimony of various witnesses. A change in the regular Monday route of the money truck now called for a few stops to pick up the receptacles containing the Sunday collections of several churches, and then stops at various branch banks to drop off the bags of currency that had been requisitioned from the main office. The robbers no longer needed the machine gun or the Mercury station wagon, and so this car was abandoned in the parking lot at the shopping center in July. But the robbers still needed two stolen cars, as we shall see.

The plan of St. Anthony's Church Rectory (Gov't Exhibit 1) shows the entrance door from the street leading to a group of small waiting rooms and an office. There is a passage on the left providing access to and from the Church. As the Church was open to the public, it was a simple matter for these professionals, even with their equipment, to enter the Church, go up the passage and congregate in the vestibule behind the entrance door at about 8:50 A. M., precisely the time they expected the money truck to arrive. Several priests and a caretaker, who was the father of one of the priests, arrived there too, but they were quickly handcuffed, their legs tied and a

strip of tape placed over the mouth of a priest who cried out. Each of the three robbers in the vestibule had a pistol. The panel truck pulled into the driveway of the Rectory, the two guards came to the door and rang the bell. The doors were flung back and the guards were handcuffed, their legs tied and they were pushed to the floor with their faces to the wall in less time than it takes to tell about it. One of the robbers pointed his pistol at the guard who had the key to the back and only entrance to the body of the panel truck, and the robber said "Give me the key or I'll blow your brains out." The key was forthcoming and the robbers rushed out. In the meantime, the fourth robber, who had been driving nearby in a black Chevrolet sedan, pulled up alongside the money truck and the transfer of the money bags from the panel truck to the black Chevrolet sedan was quickly effected. Nor were the receptacles containing the Sunday collections at St. John's Cathedral, St. Boniface Church and that of St. Anthony's Church itself left behind by the robbers. These collections brought the total loot to $517,721.49. The men who had been handcuffed and tied up said the robbers wore face masks, cloth gloves, shiny rubbers, two pairs of trousers each and Army jackets. Sister Olympia, one of the nuns who lived in the Convent on the other side of the Church, was slowly passing in a car with Mrs. Bice Mascuilli and they first thought it was a funeral. Sister Olympia observed a man who wore a mask carrying a bag from the truck to the Chevrolet.

The pieces of white cord used to truss up the priests and the guards were destined to be of great significance in the investigation that followed. Two stolen cars were destined to connect Callahan, Kapatos, Pierce and Speditz with the robbery of December 21, 1964. And a variety of more or less fortuitous occurrences contributed to the solution of the crime.

That each and every one of these professional robbers was skilled in the art of stealing cars, locked or not, may be inferred from the joint decision, participated in by Callahan and his four confederates, to the effect that each would be on the alert to steal a station wagon at the first available opportunity. And each of the robberies or attempted robberies described in the proofs required the use of a number of stolen cars, so that any identifications by bystanders of the make, description and license numbers of cars participating in the robbery could not be connected up with the perpetrators of the crime. All this, however, proved unavailing to Callahan and Kapatos.

The black Chevrolet in which the four robbers escaped with the loot was found a few days after the robbery in a parking lot 6 or 7 miles from the Rectory, in nearby Hackensack. White paint scrapings on the right front fender upon laboratory examination were found to be identical with the white paint on the door frame and door of Pierce's garage. On January 22, 1965 the right door frame of this garage had black scrape marks at about the same height as the black Chevrolet's right front fender. The car belonged to William Rubin. It was a 1964 four-door Impala black Chevrolet sedan and was stolen on October 21, 1964, almost right under Rubin's nose, from the place he had parked it on the Brooklyn side of the Verrazano Bridge. Rubin testified the Chevrolet was practically a new car and there was no white paint on the right front fender before it was stolen. An electrician's knife which did not belong to Rubin was found on the front seat, and it was of a type that would have been useful in cutting off lengths of rope or cord such as those used to truss up the priests, the caretaker and the guards in the Rectory. Rubin also testified there were two beach chairs and a red quilt in the Chevrolet when it was stolen. These were

found after the robbery in the apartment of Speditz in the Bronx, where he and Callahan were living, and Rubin identified these as the same articles that had been in his car when it was stolen.

Another stolen car was found on December 21, 1964, the very day of the robbery, a short distance from the Rectory on the same block where the original group of five had planned to intercept the money truck as it passed the factory. This was an Aqua Blue Bel Air 1964 Chevrolet four-door sedan. It belonged to Eugene Iacovella. Mrs. Iacovella testified it had been stolen from the parking lot of Alexander's on Route 4 at Paramus on November 7, 1964. When the car was stolen a pair of slacks belonging to Iacovella's daughter was in the trunk of the car. These slacks were being taken back to the store because the zipper was defective. There also was in the trunk of the car something less than 100 feet of white nylon cord, such as is used for Venetian blinds. When Iacovella opened the trunk of the car at the police garage, he found his daughter's slacks were gone and 44 feet of the nylon cord were also missing. He found a black leather pistol holster that did not belong to him and was not in the car when it was stolen. It requires little imagination to deduce that the pistol holster was left there by the robbers. There was expert testimony to the effect that the portion of Iacovella's cord left in the car was identical in diameter, color, composition and in every observable respect with the pieces of cord that had been used to tie up the priests, the caretaker and the guards; and the girl's slacks, defective zipper and all, were found in the Speditz apartment while he and Callahan were living there together. The various articles taken from the Speditz apartment were discovered pursuant to the authority of a search warrant.

So, reconstructing the crime, we think it highly probable that Callahan, Kapatos, Pierce and Speditz arrived at the switching place on December 21, 1964 in three cars, that they left Pierce's "clean" car in some parking lot and proceeded with the two stolen Chevrolets, Rubin's black Impala, and Iacovella's Aqua Blue Bel Air, to the vicinity of the Rectory. The Iacovella car was used to take three of the robbers close to the Church so they could get in to the vestibule of the Rectory at just the right time. Then, if anything went wrong, this same car could be used for a getaway. As it happened, the scheme succeeded beyond their expectations and they all departed in the black car and left the Aqua Blue Bel Air in the street.

II.

What Occurred After the Robbery

The details of the identification procedures, which are attacked by appellants as lacking compliance with constitutional standards, and the alleged illegal search of the person of Callahan in Miami Beach on January 22, 1965, will be discussed later in this opinion when we come to the law points.

On January 1, 1965 Callahan was observed with an unidentified man driving off in Kapatos's new 1965 green Oldsmobile with clothing and packages from the Speditz apartment. Speditz and Callahan also bought new cars. Both Speditz and Callahan were seen in Miami Beach, Fla., in January, 1965. In March, 1965 Roberts had several significant conversations with Kapatos and with Callahan. Indeed, Kapatos spoke to Roberts often about the robbery, telling Roberts that his share of the loot was over $100,000 and asking his cooperation in putting a portion of this sum out at loansharking interest or in gambling at

the waterfront. But Roberts held off. In one of these post-robbery conversations with Callahan, the latter remarked "Aren't you sorry that you didn't have a hunk of that score."

Neither Callahan nor Kapatos testified in his own defense; and Kapatos's weak alibi was pretty well battered by the evidence produced by the Government in rebuttal.

It is worthy of comment that the prosecutor, Assistant United States Attorney John R. Wing, conducted the Government's case with singular poise and composure, in the face of what must have seemed to him to be provocative dilatory tactics, and his masterful summation pulled all the threads together.

We have been at some pains, after a study of every page of the transcript, and a view of all the exhibits, to set forth a summary of the proofs, not only to make plain the undoubted guilt of Callahan and Kapatos, but, hopefully, to forestall some of the usual applications for post-conviction remedies, which now have so increased in volume as to constitute a serious problem of administration in the federal courts.

We turn to the law points.

III.

Hearsay Before the Grand Jury

We are ask to reverse the judgments of conviction of Callahan and Kapatos and to dismiss the indictment because none of the forty-odd witnesses who testified at the trial was called before the Grand Jury. But the situation here is for all practical purposes the same as in *United States v. Costello*, 221 F.2d 668 (2d Cir. 1955), *affirmed*, 350 U.S. 359 (1956), with the difference that the intricate

and complicated details of *Costello* involved an alleged income tax fraud, whereas here the intricate and complicated details have to do not only with the four priests, the caretaker and the two guards who were trussed up and other witnesses at the scene of the robbery, which no one disputed, but also with expert witnesses on the subject of the rubber band found on Callahan, the paint particles and wood fragments connecting the stolen black Impala Chevrolet with Pierce's garage and the comparison of the cord used to bind the victims with the remaining 42 feet of the identical cord found in the abandoned Aqua Blue Bel Air Chevrolet. A dozen or more witnesses contributed small individual details which in the aggregate unfolded the story of the four stolen automobiles. And so on. It would have served no useful purpose to have produced this array of witnesses or any of them before the Grand Jury. The only result would have been needless expense to the Government and great inconvenience to the witnesses, many of whom lived at considerable distances from the federal courthouse in New York City. The Grand Jury minutes were unsealed so that we might see them, although these minutes were not shown to counsel for Callahan and Kapatos. We have read these minutes and there is no doubt the Grand Jury knew and was told that what was placed before it was hearsay.

The insistence by appellants that the failure to produce Roberts and Sister Olympia before the Grand Jury constitutes a fatal defect comes with exceedingly ill grace, as there had been two attempts to murder Roberts, one in November of 1965, when he was shot in the chest, but survived, and another in August, 1967 when he was blown up by a bomb in his car but survived, minus one leg and with his right arm crippled for life. The FBI discovered that a third attempt was being planned and managed to

get him out of the way. The Government also represents that the two remaining conspirators, Pierce and Speditz, were "executed," which we suppose means murdered, in or about December, 1965. The record does not disclose the identity of the persons who mastermined the attempts to murder Roberts or whether the doing away with Pierce and Speditz was for the purpose of forestalling some attempt to assist the Government in its prosecution of Callahan and Kapatos or to make off with the share of the loot allotted to Pierce and Sepditz. In any event, no word of any of these murders and attempted murders was mentioned in the presence of the jury. As to Sister Olympia, as we shall soon see, her recognition of Kapatos by his voice when he complained in no uncertain terms at having his picture taken while in one of the rooms of the federal courthouse in Newark, N. J., on January 25, 1965 was not known to the FBI when the case was presented to the Grand Jury. The reason it was not known was that she was asked if she recognized anyone connected with the robbery and she thought this referred only to the masked man she saw carrying a bag from the panel truck to the black Impala Chevrolet and not to the beggar who on two prior occasions had come to the Convent asking for food. Even if this were not so, the Government was under no obligation to offer Sister Olympia, or any other particular person, as a witness before the Grand Jury.

This Court has never dismissed an indictment because the indictment was supported only by hearsay,[1] and this statement applies both before and after the classic statement by Judge Learned Hand in *Costello,* 221 F.2d at page 679.

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[1] The writer of this opinion still believes there was some merit in his dissent in *United States v. Beltram,* 388 F.2d 449, 451 (2d Cir.), *cert. denied,* 390 U.S. 1017 (1968) but that dissent remains only a dissent from the prevailing view, and it was applicable only to a particular undesirable practice in narcotics cases which has long since been abandoned.

IV.

Callahan and the Rubber Band

On January 22, 1965 at 9:30 in the morning three FBI agents requested admission to Callahan's room in the Ocean Haven Hotel in Miami Beach, Fla. He let them in and they told him they would like to have him come with them to the FBI office. He was told that they wanted to see him in regard to the currency truck robbery in Paterson in December, 1964, that he did not have to consent to the interview, that any statements he made could be used against him in a court of law, and that he had a right to consult an attorney before making any statement. This was long prior to *Miranda*[2] and was in accord with what had been for many years standard FBI procedure. He was also told he was not under arrest and did not have to come with the agents. He readily agreed, however, and went with them to the FBI office after putting on his trousers, a T-shirt and his shoes. At the office he told the agents he knew his rights and had no intention to answer any questions whatever. Moreover, he refused to be fingerprinted or to be photographed. When asked if they might "pat him down" he said "yes," and in the process of patting down one of the agents felt a slight bulge in the waistband of the trousers. This turned out to be a slit in the waistband and in this slit, which formed a sort of small pocket, was a rubber band. Callahan made no protest or objection and said he didn't know what it was. He produced some bills and handed them over. He took off his trousers and they were examined without result. The rubber band, which at the time no one thought had any significance, was thrown on the table and he said they could have it. After taking the money produced by Callahan and re-

[2] See n. 4, *infra*.

turning an equivalent amount to him, the rubber band was put around the bills he produced, in the sum of about $140, and the bills were sent to the FBI Laboratory in Washington for examination.

Callahan's version of the incident, given at a hearing in the absence of the jury, was understandably quite different. He said the agents rushed in guns in hand and that he was considerably manhandled and pushed about despite his vigorous protests. His memory with respect to the rubber band did not seem to be very good. He thought he took it out of his pocket and handed it to the agents. In one of his affidavits used in support of one of the numerous pre-trial motions he gave the impression that the agents found it in the course of an allegedly illegal search of his room.

In any event, Judge Murphy concluded that he believed the agents and did not believe Callahan, so the motion to suppress, based upon an alleged violation of Callahan's constitutional rights, was denied.[3] We find no error here.

If an individual unequivocally, freely and intelligently gives his consent to a search of his person, there is no violation of his constitutional rights (*United States v. Smith*, 308 F.2d 657 (2d Cir. 1962), *cert. denied*, 372 U.S. 906 (1963)), and whether or not such consent has been given is primary a question of fact, better left to the trial judge, who must pass upon the credibility of the witnesses. *United States v. Cachoian*, 364 F.2d 291 (2d Cir. 1966), *cert. denied*, 385 U.S. 1029 (1967); *United States v. Thompson*, 356 F.2d 216 (2d Cir. 1965), *cert. denied*, 384 U.S. 964 (1966).

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[3] Although Kapatos joins Callahan in claiming the search was illegal, he is without standing to object to a violation of Callahan's Fourth Amendment rights. *Jones v. United States*, 362 U.S. 257 (1960).

We infer from Callahan's complaisance that he really did know his rights, as he answered no questions, and refused to be either photographed or fingerprinted. But he had altogether forgotten about the rubber band and, feeling quite positive that the money in his pocket was no part of the loot and that his trousers contained nothing that could possibly incriminate him, he was quite willing to have the FBI examine his trousers till the cows came home. This was, we think, a quite adequate explanation of his conduct. *United States v. Curiale,* 414 F.2d 744, 747 (2d Cir.), *cert. denied,* 396 U.S. 959 (1969).

As the evidence at the trial disclosed, this was not an ordinary rubber band but one 3 inches long by ⅜ of an inch in width, of amber color, precisely the same as the rubber bands used by the First National Bank of Passaic to bind the bundles of bills placed in the bags taken by the robbers from the panel truck at the Rectory on December 21, 1964.

V.

The Theft and Interstate Transportation of the Mercury Station Wagon

Callahan claims that the proofs are not sufficient to connect him with the stealing of the Lebowitz 1962 Mercury station wagon. He says he did not steal the car, that no witness testified that he ever rode in the car or that he knew it would be driven to New Jersey. But all this is beside the point and of no avail to Callahan.

We have already seen the part stolen cars played in the development of the conspiracy charged in this case. The jury had a right to infer that Callahan, as well as Campbell, Kapatos, Pierce and Roberts, was ready, willing and able to steal the station wagon they needed for the machine

gun operation, because the proof is they all agreed that "each and every one of us was to be on the alert in regards to stealing a station wagon." Callahan's acceptance of this responsibility was an inducement and encouragement to the others. Each was relying on what each of the others had agreed to do. Callahan had committed himself to the doing of an act in furtherance of the enterprise. This was all that was necessary to warrant a finding by the jury that he aided and abetted the others including Kapatos, who actually stole the car. *Nye & Nissen v. United States,* 336 U. S. 613 (1949); *United States v. Peoni,* 100 F.2d 401 (2d Cir. 1938). And this was in accordance with the unexceptionable instructions given by Judge Murphy, which were deemed satisfactory by the defense. The requirement of interstate transportation was no more than a jurisdictional requirement satisfied by proof that Kapatos drove the car from New York to New Jersey. *United States v. Blassingame,* 427 F.2d 329 (2d Cir. 1970).

Callahan was charged as an accessory before the fact and thus a principal, under 18 U.S.C. Section 2 (1964). *United States v. Pritchard,* 55 F. Supp. 201, 203 (W.D.S.C.), *affirmed per curiam sub nom. Waters v. United States,* 145 F.2d 240 (4th Cir. 1944). We find no insufficiency in the proofs supporting Count 8 of the indictment as against Callahan.

VI.

Sister Olympia and the Identification Procedures

This brings us to the most interesting phase of the case. The disguises had been so cleverly devised that of the seven victims trussed up and the people passing by in the street not a single one could identify any of the four robbers, in court or otherwise. One of the priests saw a

tuft of gray hair protruding from under the mask of one of the robbers but no one saw the face of any of them. The three inside robbers who trussed up the priests, the caretaker and the guards were described as one shorter than the two others, but all the victims were so frightened that they had little to offer that would help the investigators.

A few days after December 21, 1964 two FBI agents came to the Convent to see Sister Olympia, the nun who had reported seeing a masked man carrying a bag from the panel truck to the black Chevrolet. She was shown several photographs, including those of Callahan and Kapatos. The hope, of course, was she might recognize the man she had described. But she said she could not say he was the man shown in any of the photographs. Just before December 30, 1964 she said she had been thinking the matter over and would like to see the photographs again. So she did see them again and repeated what she had said before, that she could not say the man she saw at the time of the robbery was shown in any of the photographs. She added, however, that the photograph of Kapatos looked like that of a man who had twice come to the Convent a month or two before, begging for something to eat. And she further told the FBI agent that a slight growth of hair on the begger's face was turning white and that he was dressed better than the usual alcoholic who comes to beg for food. There the matter rested for some time, as this information did not at the time seem to be of any particular significance.

As a result of the service of a number of Grand Jury subpoenas, all or most of the witnesses to the robbery and a number of suspects, including Callahan and Kapatos, were present in the antechamber adjoining the Grand Jury

room in the federal courthouse in Newark, N. J., on January 25, 1965. The record before us does not disclose the names of those who testified before the Grand Jury, if any of them did, nor the subject matter of such testimony, if any. But a number of the witnesses sitting on benches in the anteroom saw the people walking around. Father Kirk, who arrived at the Rectory a minute or two before the money truck, and who had been promptly yanked into the vestibule, handcuffed and tied up, had noticed that one of the robbers who had done this walked with a sort of limp or a characteristic manner of walking. He pointed out Callahan to the agents as the man who seemed to walk in this slightly unusual manner. No point seems to be made about this in any of appellants' briefs.

Adjoining the anteroom, however, was the Library of the United States Attorney and through the spaces over and between the rows of books a person, without being observed, could look into the next room. Two or three people were there, including a man sitting at a table. A number of the witnesses, including Sister Olympia, were placed behind these bookcases and they were told to look and see if any person appearing in the other room was recognized "as being associated with the bank robbery." No names were mentioned. Then, evidently as planned or directed by the FBI, Callahan, Kapatos and a man named Wilde walked, one by one, through the room where the man was sitting at a table. This man was evidently trying to take a photograph of Kapatos as he walked by and Kapatos saw him. Immediately Kapatos began to complain and to object to having his picture taken. While Sister Olympia had not at first realized who he was, as soon as she heard his voice she knew it was the beggar who came to the Convent for food on the two occasions prior to the robbery.

But she said nothing of this to the FBI agent who gave her the instructions as she had no reason to suppose the beggar was in any way "associated with the bank robbery." Much later, presumably in connection with the preparation for the trial, she had further discussions with someone connected with the prosecution and she did tell him she had recognized the beggar by his voice on January 25, 1965.

At the trial Sister Olympia, viewing those present at the trial, could not say that she recognized anyone. But the FBI agents were permitted, over objection, to testify to the recognition, at the time of viewing the photographs, by Sister Olympia of Kapatos as the beggar and to supplement the testimony of Sister Olympia about recognizing the beggar by his voice at the courthouse in Newark by identifying as Kapatos the person to whom Sister Olympia was referring as the beggar.

The main thrust of the attack on Sister Olympia testimony by counsel for Kapatos is that at a critical juncture Kapatos was deprived of the benefit of counsel. We are told Kapatos and Callahan had retained counsel who were in attendance to protect their rights in connection with the Grand Jury subpoenas that had been served on them, and that at the very least they should have been told that persons were looking at them from behind the bookcases and that they were entitled to the presence of a lawyer to represent each of them. Reliance is placed on a whole series of cases, including not only the trilogy of *Wade*, *Gilbert* and *Stovall*, but also *Miranda* and *Escobedo*.[4]

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[4] *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Stovall v. Denno*, 388 U.S. 293 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964).

In addition to the Sixth Amendment claim it is contended that the lineup, if it can be called such was unnecessarily suggestive and conductive to irreparable mistaken identity in the light of the totality of surrounding circumstances.

By way of preliminary we hold there is nothing whatever in this record to indicate that there was any illegality or impropriety in serving these Grand Jury subpoenas requiring the presence outside of the Grand Jury room of a considerable number of those who knew something about the robbery, including a number of suspects who might or might not be willing to testify. We adhere to our ruling on the same subject in *United States v. Corallo,* 413 F.2d 1306 (2d Cir.), *cert denied,* 396 U. S. 958 (1969).

A.

That showing the photographs to Sister Olympia was a permissible procedure was the precise holding in *Simmons v. United States,* 390 U.S. 377, 384 (1968); see also *United States ex rel. Beyer v. Mancusi,* ___ F.2d ___ (2d Cir. January 5, 1971). On the face of the evidence we have just summarized it is clear to us there was nothing suggestive about the way in which Kapatos was brought within the view of those behind the bookcases. No names were mentioned and the result of the inquiry concerning those connected with the robbery, including the masked man Sister Olympia had seen carrying the bag from the bank's money truck to the black Chevrolet, was completely negative. Neither the FBI agent in charge nor Sister Olympia was thinking of the beggar. It was only by a fortunate quirk of fate that Kapatos complained about having his picture taken, and Sister Olympia at once recognized the

voice as that of the beggar. We reject the claim of suggestiveness as frivolous. And the same may be said of the objection to testimony by FBI agent James R. Laughlin identifying Kapatos as the person referred to by Sister Olympia as the beggar.

B.

In answer to the contention that the refusal to exclude the testimony of Sister Olympia constituted a deprivation of the right to counsel under the Sixth Amendment we think it is sufficient to say: (1) The so-called lineup was not in any sense custodial; Kapatos was not under arrest nor was he subject to restraint of any kind; and he was not indicted until August 5, 1968, more than three years after the incident of January 25, 1965. (2) The incident in question occurred long prior to the decisions in *Wade, Gilbert* and *Stovall,* which were filed on June 12, 1967 and the new rulings changing the pre-existing law were held to have no retroactive effect. Whether or not a similar procedure under similar circumstances, occurring on a date subsequent to June 12, 1967 would be held to be illegal is not a matter before us for decision nor do we express any opinion on the subject.

We would be content to let the matter rest here but for the fact that there is an undertone or motif running through appellants' briefs which seems to challenge any and all identifications, from the time of the commission of a crime down to the date of the trial, where any stratagem or deceptive practice is adopted by law enforcement officers to facilitate the identification of a suspect by witnesses to the commission of the crime, unless the suspect has been warned in advance of his right to have a lawyer present.

The point seems to be, from the moment suspicion, however slight, is directed to a person who may have had some connection with the commission of a crime, there is "a critical period," and no deceptive device or stratagem or effort that is in any way misleading can be resorted to by law enforcement officials to provide victims of the crime or witnesses with any opportunities to identify the suspect, unless the suspect is warned in advance and told not only that there will be what counsel chooses to call a lineup or showup but that he is entitled to the presence of a lawyer to represent him at the viewing. If the suspect claims to be indigent and has no retained lawyer, it would be logical to suppose that the argument would include a requirement that he be told, if he could not hire a lawyer, one would be assigned to him free of charge. An elaboration of this contention is to the effect that, if it is known that the suspect already has a retained lawyer, law enforcement officers must refrain from having, through their agents or otherwise, any conversation or communication with the suspect without first obtaining permission to do so from his lawyer, as the Canons of Professional Ethics of the American Bar Association forbid a lawyer from communicating with the client of another lawyer without his consent or approval.

Of course, if there is a right to have a lawyer present in these cases of non-custodial identification procedures, law enforcement officials might as well shut up shop. For, if the lawyer is worth his salt, the first thing he will do is tell his client to make himself scarce, and no identification will be possible. Only those caught *in flagrante delicto* could ever be identified.

So, we think it proper to express our view that after the commission of a crime, in addition to the use of photographs, as permitted by *Simmons*, we can find nothing in *Wade, Gilbert, Stovall* or any other court decision banning stratagems or deceptive practices in general or preventing law enforcement officers from putting witnesses in a position to see or photograph a suspect in the neighborhood of his home, or at his work, playing golf or doing anything else in a public place. And all this, we think, can be properly done without letting the suspect know in advance that he is to be viewed or telling him he has a right to the presence of a lawyer. *United States v. Black*, 412 F. 2d 687 (6th Cir. 1969), *cert. denied*, 396 U. S. 1018 (1970); *United States v. Lipowitz*, 401 F. 2d 591 (3d Cir. 1968), *cert. denied*, 395 U. S. 924 (1969); *United States v. Quarles*, 387 F. 2d 551 (4th Cir. 1967), *cert. denied*, 391 U. S. 922 (1968). We think the principles of these cases are not affected by the rulings in *Wade, Gilbert* and *Stovall*.

Other examples of perfectly proper practices that have often been used in the past, without criticism by the courts, and which doubtless to some extent may mislead a suspect, are the following. The use in automobiles or elsewhere of one-way glass windows so contrived that the person behind the window can see what is going on outside but passers-by or the individuals to be viewed as suspects cannot see those on the other side of the window. Cameras can be designed so as to look like the transits or theodolites used by engineers and surveyors.

In view of what we have just said, it is interesting to note that the very same Kapatos who was convicted in the case now before us was also convicted of armed robbery of a jewelry truck. The robbery of the truck occurred on November 8, 1963 and the trial took place in October, 1966.

The car with the robbers followed the jewelry truck and edged it over to the curb of a street in New York City. The Government claimed Kapatos was on the front seat of the robbers' first car dressed as a policeman. The evidence was that the so-called policeman, holding a pistol, and his associates, two of whom wore masks, overpowered the driver and the six other occupants of the jewelry truck and put them "shackled and handcuffed" in the robbers' second car that had come up from the rear. The two masked robbers had come up on either side of the jewelry truck. But the whole scheme misfired because the robber who was to drive the jewelry truck off with the loot could not operate the particular kind of gear shift that was on the jewelry truck. The principal issue at the trial and on the appeal to this Court related to the testimony identifying Kapatos as the disguised policeman. This identification had been effected by taking one of the men who had been trussed up during the attempted robbery down to the very Delancey Street job of Kapatos repeatedly referred to in the testimony in the case before us. But on the appeal to this Court from this prior conviction[5] and on the various post-conviction applications[6] no contention whatever was made that Kapatos was entitled to be warned before these one-to-one viewings and told that he had a right to have a lawyer present. The contentions all very properly clustered about the question of whether or not the manner in which

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[5] *United States v. Kapatos, affirmed from the bench* on March 3, 1967 (2d Cir. Docket No. 30967), *cert. denied,* 389 U.S. 836 (1967).

[6] *Kapatos v. United States,* first petition denied on November 30, 1967 (67 Civ. 3847) (S.D.N.Y.), *affirmed from the bench* on April 23, 1968 (2d Cir. Docket No. 32028), *cert. denied,* 393 U.S. 852 (1968); second petition denied on December 12, 1969 (69 Civ. 3930) (S.D.N.Y.); third petition denied on February 16, 1970 (70 Civ. 166) (S.D.N.Y.), *affirmed,* 432 F.2d 110 (2d Cir. 1970) (Friendly, J.), cert. denied, 39 U.S.L. Week (U.S. Feb. 22, 1971).

Kapatos was brought within the view of the witness was "impermissibly suggestive." This, of course, is a proper subject of inquiry in the case of any identification proof, and this was true before June 12, 1967, as pointed out in *Stovall.*

The Canons of Professional Ethics of the American Bar Association which proscribe communications by a lawyer with the client of another lawyer without his consent or approval have no bearing whatever on the problems before us in this criminal case.

Conclusion

The effrontery with which these desperate and dangerous men assault society with their repeated acts of criminal violence makes a mockery of the rules they ask us to apply favorably to their contentions for reversal of these judgments, as these very rules were formulated in the interest of justice and for the protection of the innocent. These appellants were entitled to a fair trial and that is what they got.

The judgments are affirmed; the $100,000 bail of Callahan is revoked, and it is ordered that the mandate issue forthwith.